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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO LUIS ALVAREZ, Defendant and Appellant.	A131036 (Solano County Super. Ct. No. VCR198301)

Eduardo Luis Alvarez was convicted by jury of second degree robbery (Pen. Code, § 211)[1] and false imprisonment by violence (§ 236). The jury found, as to the robbery count, that Alvarez personally and intentionally discharged a firearm, causing great bodily injury (§ 12022.53, subd. (d)), and, as to both counts of conviction, that he personally inflicted great bodily injury (§ 12022.7, subd. (a)).

Alvarez argues that: (1) the trial court prejudicially erred by ruling that a former codefendant, whom Alvarez sought to call as a witness, could assert the Fifth Amendment privilege against self-incrimination; (2) his trial counsel provided ineffective assistance by introducing expert testimony about Alvarez's character that opened the door to impeachment, and by failing to introduce exculpatory evidence; and (3) the trial court prejudicially erred by failing to instruct sua sponte on a less serious firearm

[1] All statutory references are to the Penal Code unless otherwise indicated.

enhancement (personal use of a firearm; § 12022.53, subd. (b)). We affirm the judgment.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Charges*

An amended information charged Alvarez with the attempted murder of Oscar Rodriguez (count 1; §§ 187, subd. (a), 664), robbery (count 2; § 211), and false imprisonment by violence (count 3; § 236). As to counts 1 and 2, the information alleged that Alvarez personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). As to all three counts, the information alleged that Alvarez personally inflicted great bodily injury (§ 12022.7, subd. (a)).

B. *The Evidence Presented at Trial*

1. *The Prosecution Case*

In June 2008, Oscar Rodriguez lived in Cordelia, where he met Curtis Drennan and Alvarez, both of whom sometimes stayed at the home of Rodriguez's neighbors, Felicia P. and her 15-year-old brother, Manuel P., also known as "Junior." Rodriguez was a sharp dresser and appeared to have money, while Drennan and Alvarez appeared be "broke." Rodriguez liked to smoke marijuana. Drennan took various drugs.

In early June 2008, Drennan's girlfriend asked Rodriguez for help because Drennan had overdosed on ecstasy. When Rodriguez arrived at the P.s' house, Drennan was in pain and Alvarez was asleep. Rodriguez was unable to wake Alvarez. Rodriguez attempted to get Drennan into his car to take him to the hospital. Drennan was "running around aimlessly" outside the house, and at one point fell down. Rodriguez later heard that Drennan escaped from the hospital.

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[2] Alvarez has also filed a petition for a writ of habeas corpus (No. A136308), alleging that the prosecutor at his trial committed misconduct, and that his trial counsel provided ineffective assistance. We address that petition in a separate order filed concurrently herewith.

Late at night on June 11, 2008, Drennan, using Alvarez's cell phone, called Rodriguez and asked if he wanted to smoke marijuana. Rodriguez said he did. Rodriguez waited for 20 to 30 minutes for Drennan and Alvarez to arrive, and tried unsuccessfully to contact Drennan. Rodriguez then drove down the street and parked in front of the P.s' house. Rodriguez and Junior planned to obtain marijuana elsewhere. Junior told Rodriguez that Drennan and Alvarez had called earlier and said they were planning to rob "Kesha" for drugs.

Drennan called Rodriguez from Alvarez's cell phone and stated that he had been waiting at Rodriguez's house. Rodriguez knew that was not true because he had just left his house. Rodriguez drove back to his house with Junior. Drennan did not want Junior along, so Rodriguez drove him home. Rodriguez got into the driver's side back seat of Alvarez's car and sat next to Alvarez. Drennan sat in the front passenger seat. Drennan introduced Rodriguez to the driver, "John-John," whom Rodriguez did not know. Drennan, Alvarez and John-John appeared to be drunk, and their speech was slurred.

The four men drove to a Shell gas station. Rodriguez was told to buy a couple of Swisher cigars, which they would use to roll and smoke marijuana. Rodriguez was unable to get out of the car because the child safety lock was on. Alvarez said a child had been in the back seat; Alvarez then told Drennan to get out and unlock Rodriguez's door. As Rodriguez got out of the car, he unlocked the child safety lock.

After Rodriguez bought the cigars and returned to the car, John-John drove the car to a secluded vista point parking lot and backed into a parking spot near a recreational vehicle. A semi-truck was also parked in the lot. The area was not well lit. The lot overlooked the freeway and a Jack-in-the-Box. Rodriguez opened the door to dump the tobacco out of one of the cigars. Everyone was silent, and it seemed to Rodriguez that they were surprised he could open his door. Rodriguez gave his cigar to Drennan and waited to see the marijuana. While he waited, Rodriguez played with his $380 gold "grill" (gold caps for his teeth), which he had shown to Drennan during the car ride. Rodriguez, who wanted to go back home to sleep, said " 'let's make this quick.' " Drennan asked John-John if he wanted to "slap fight" outside the car. Drennan and John-

John walked about 10 feet away from the car and exchanged a "little smile," but did not fight.

Drennan and John-John returned and leaned against Rodriguez's door. Alvarez pulled out a revolver and held it to Rodriguez's temple and neck. Alvarez said, " 'Give me everything you got. Give me your wallet.' " Rodriguez yelled at Drennan to " 'check [his] boy[.]' " Drennan leaned into the partially open window and said, " 'You better do it the easy way or the hard way, man. It's like, Eddie, man, you better use that, man. You better not be pulling it out and not using it. You better use it.' " Pointing the gun between Rodriguez's temple and neck, Alvarez responded, " 'Don't think that I won't.' " Rodriguez gave Alvarez his wallet, which had no money in it. Alvarez was "extremely upset" and asked Rodriguez where all his money was. Rodriguez said he did not have any, but then remembered he had $15 in his pocket for "munchies," and gave it to Alvarez. Alvarez said, " 'Where's the rest of it?' " Rodriguez said he did not have any more money, but took his cell phone and car keys out his pocket. Alvarez snatched them from Rodriguez. Drennan said, " 'Check him for more, check him for more.' " Alvarez "sissy punch[ed]" Rodriguez in the face a few times, while still pointing the gun at Rodriguez. Drennan said, " 'Get his grill.' " Drennan put his hand into Rodriguez's mouth. Rodriguez was angry, slapped Drennan's hand away, pulled the grill out himself, and threw it on the ground.

John-John then opened Rodriguez's door. Rodriguez put his left leg out of the car. Rodriguez also attempted to slap or push away the gun Alvarez was holding. Alvarez, Drennan and John-John yelled at Rodriguez to put his leg back in the car, saying " 'You ain't going nowhere. Where do you think you're going?' " Drennan was holding a knife with a 10-12 inch blade, and threatened to stab Rodriguez if he did not do what Alvarez said. Drennan also told John-John to pull out his "thing," which Rodriguez believed meant a gun, but he never saw John-John holding one. John-John kicked Rodriguez in the head about five times. Rodriguez noticed that Drennan was smirking. Alvarez then shot Rodriguez in the back. Rodriguez yelped. He saw that Drennan "had a big old

smile on his face[.]" Rodriguez estimated that about two seconds elapsed between the time he put his leg out of the car and the time Alvarez shot him.

Alvarez tried to take off Rodriguez's belt and pants, but Rodriguez, who was hunched over after being shot, said he would do it himself. Rodriguez fumbled with the belt but could not unfasten it. Alvarez, Drennan and John-John yelled at Rodriguez to " 'get out of the F'ing car.' " As Rodriguez got out of the car, Alvarez shoved him. Rodriguez dropped to his knees outside the car, fearing that, if he stood up, his attackers "would think that one shot wasn't enough[.]" John-John jumped into the driver's seat. Drennan looked at Rodriguez for a split second, slammed Rodriguez's door, and said " 'This isn't the way this is supposed to happen.' " Drennan got into the front passenger seat. As the car drove away, Rodriguez could see Drennan looking at him through the rear window.

Rodriguez knocked on the door of the RV and then the semi-truck, but no one answered. Rodriguez walked back to the Shell gas station, which took 15–20 minutes. He passed out after arriving at the gas station. Police and paramedics later arrived. Rodriguez was in pain, and was lying on the floor with blood around him. Rodriguez told police that "Eddie, Curtis, and John-John" had attacked and robbed him at the vista point, and that "Eddie" had shot him. The paramedics took Rodriguez to the hospital, where he underwent emergency trauma surgery.

The parties stipulated that the medical evidence showed that the bullet entered the right side of Rodriguez's back, traveled through his lower left lung, and into his seventh rib, fracturing it. There were bullet fragments throughout his chest area. The bullet remains lodged in his rib cage, and he has a scar.

At the time of trial, Rodriguez still had sleepless nights and was nervous and antisocial. He believed his physical problems were the reason he lost his job wrapping pallets. He testified he had been "completely by myself" during the two years between the shooting and trial.

Detective Chad Sayre of the Solano County Sheriff's office responded to the scene of the shooting in the early morning hours of June 12, 2008. Sayre found part of a cigar

at the vista point. He knocked on the doors of the RV and the semi-truck, but no one answered. Sayre photographed Rodriguez after his surgery. He had bruises and scuff marks on his face, as well as a cut lip.

Police found Alvarez's car in Pittsburg. Evidence technician Kari Lee processed the car. Lee found a grill on the floor, as well as blood on the rear driver's side seat. (Rodriguez later identified a grill apparently found in the car as belonging to Alvarez.) Lee also found a Swisher cigar, a pair of bloodstained jeans, Rodriguez's wallet (containing his driver's license), and a receipt in Rodriguez's name. The glove compartment contained evidence of insurance in Alvarez's name. In the trunk was a juvenile minute order in Alvarez's name. At trial, Rodriguez identified the bloodstained jeans as belonging to Alvarez.

2. *The Defense Case*

Alvarez presented a duress defense to the robbery and false imprisonment charges, and an accident defense to the attempted murder charge and the allegation that he personally and intentionally discharged the gun.

Alvarez testified on his own behalf. When Alvarez was about 17 years old, he met Drennan, who Alvarez believed was older. They went to parties, drank, and smoked marijuana and crystal methamphetamine together. Alvarez's stepfather kicked Alvarez out of the house when Alvarez turned 18 and received a "settlement check" for over $11,000. Alvarez began staying with Drennan, who was his good friend. During a two-month period, Alvarez spent $6,000 of his settlement money to buy crystal methamphetamine and smoke it with Drennan.

On the afternoon before the shooting, Alvarez and Drennan were drinking and smoking marijuana and crystal methamphetamine. Drennan, who had escaped from a hospital, was mad at Rodriguez and told Alvarez that he planned to rob Rodriguez. Alvarez did not think Drennan was serious, but played along to impress Drennan.

Drennan told Alvarez that John-John was going to drive that night. When John-John stopped the car at the Shell gas station and Rodriguez went inside, Drennan handed Alvarez a small gun. Alvarez had never used a gun before. Either when Alvarez took the

gun or when Drennan and John-John later got out of the car at the vista point, Alvarez realized Drennan was serious about robbing Rodriguez. Alvarez believed that Drennan and John-John had another gun, although he never saw one. Alvarez was scared that, if he did not go along with the robbery, Drennan and John-John would shoot him. Alvarez knew that Drennan was a "bad dude," who had talked about robberies and carrying guns.

At the vista point, Alvarez wanted to get out of the car, but the child safety lock on his door was locked. When Drennan and John-John leaned against Rodriguez's door, Alvarez pointed the gun at Rodriguez and told him to " 'Give me everything.' " Drennan yelled at Alvarez that he had "better use it[.]" Rodriguez gave Alvarez some items. At some point, however, Rodriguez grabbed the gun and got on top of Alvarez. Drennan yelled at Rodriguez to get off Alvarez or he would stab him. Rodriguez got off Alvarez, and Alvarez punched him. Drennan and John-John opened Rodriguez's door and started beating him. When Rodriguez tried to get out of the car, Alvarez tried to pull him back because he did not want Drennan or John-John to shoot Rodriguez. As Alvarez grabbed Rodriguez, the gun "accidentally went off." Alvarez never meant to shoot Rodriguez. Alvarez denied pushing Rodriguez out of the car; Alvarez believed that Drennan and John-John pulled Rodriguez out of the car. Alvarez did not help Rodriguez because he was afraid of Drennan and John-John.

After the shooting, Drennan and John-John asked for the gun, so Alvarez gave it back to them. After dropping off John-John, Drennan drove to a "dope house" in Pittsburg, where he and Alvarez smoked crystal methamphetamine. After Drennan left, Alvarez stayed at the house for three days. On June 15, 2008, Alvarez turned himself in to the police.[3]

C. *The Verdict and Sentence*

The jury was unable to reach a verdict on the attempted murder charge (count 1), and the court declared a mistrial on that count. The jury convicted Alvarez on the

[3] As we discuss in part II.B.2., the defense case also included the expert testimony of Dr. Howard Friedman, a clinical neuropsychologist.

robbery and false imprisonment charges (counts 2 and 3). As to count 2, the jury found true the enhancement allegation concerning personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d));[4] as to counts 2 and 3, the jury found true the allegation that Alvarez personally inflicted great bodily injury (§ 12022.7, subd. (a)).

The court sentenced Alvarez to a determinate term of three years and eight months imprisonment (the three-year midterm for robbery, plus eight months (one-third the midterm) for false imprisonment), and a consecutive indeterminate sentence of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). The court stayed sentence on the great bodily injury enhancement (§ 12022.7, subd. (a)) pursuant to section 654. Alvarez filed a timely notice of appeal.

II. DISCUSSION

A. *Drennan's Invocation of the Fifth Amendment Privilege*

1. *Background*

The original complaint charged both Alvarez and Drennan with attempted murder, robbery, and false imprisonment. According to statements by counsel for the parties during trial court proceedings, Drennan entered a plea of guilty to the robbery count (and to a robbery charge in another case), in exchange for a seven-year prison sentence. By the time of Alvarez's trial, Drennan was serving his prison sentence, and his time to appeal had expired.

At the request of Alvarez's counsel, the trial court ordered that Drennan be brought from prison to testify at trial. In his declaration in support of this request, Alvarez's counsel stated that Drennan made statements to the police that were exculpatory, specifically "that the shooting was accidental." Alvarez's counsel also stated that Drennan "made statements to third party witnesses that it was his idea to rob

[4] As discussed further in part II.C., the verdict form and jury instructions did not ask the jurors to determine the applicability of the other firearm enhancements alleged in the information (personal use of a firearm under § 12022.53, subd. (b), and personal and intentional discharge of a firearm under § 12022.53, subd. (c)).

the victim." Counsel stated that "without Mr. Drennan's testimony, the defense will be unable to adequately represent [Alvarez]."

Before the defense began presenting witnesses (and out of the presence of the jury), Drennan's counsel informed the court that Drennan would assert his Fifth Amendment privilege against self-incrimination.[5] Drennan's counsel stated that Drennan still faced potential criminal liability because, if Rodriguez later died from his injuries, the prosecution could charge Drennan with murder. Drennan's counsel stated that, "if [the privilege claim is] overruled by the Court, then I think [Drennan] will testify."

Alvarez's counsel argued that Alvarez had a due process right to put on witnesses. Alvarez's counsel contended that Drennan's counsel had not met his burden to show that Drennan could be prosecuted for homicide or that it was reasonable to believe Rodriguez could later die from his injuries. Alvarez's counsel also noted that the cases relied on by Drennan's counsel allowed subsequent prosecution after a victim died from his or her injuries; the cases did not involve assertions of the Fifth Amendment privilege based on the possibility that a victim might die in the future.

The court held an Evidence Code section 402 hearing, at which Drennan was sworn as a witness. Alvarez's counsel asked Drennan if he had been with Alvarez on June 12, 2008, and Drennan responded by asserting his Fifth Amendment privilege. Drennan then confirmed that he would assert the privilege in response to any question Alvarez's counsel asked.

Alvarez's counsel noted that the prosecutor could grant Drennan immunity, but the court could not compel her to do so. The prosecutor stated that she did not intend to grant Drennan immunity.

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[5] Prior to trial, the prosecutor and Alvarez's counsel stated they believed that, because of his guilty plea, Drennan could no longer assert the Fifth Amendment privilege. The prosecutor, however, notified the court that Drennan's counsel intended to argue that he could assert the privilege based on the possibility that Rodriguez could later die from his injuries. The prosecutor at one point stated that she intended to call Drennan as a witness, but ultimately rested without doing so.

The court ruled that Drennan had the right to assert the Fifth Amendment privilege. The court noted the parties' stipulation as to the serious nature of Rodriguez's injuries—"the bullet remains lodged in his rib cage, and there's bullet fragments throughout his chest area." The court also noted that the Fifth Amendment is to be liberally construed, and concluded that Drennan could be prosecuted for homicide if Rodriguez later died from his injuries. The court noted that there is no statute of limitations for murder (§ 799), and that, if a victim such as Rodriguez were to die more than three years and a day after his injury, there would only be a rebuttable presumption that the killing was not criminal (§ 194). The court therefore concluded that "Mr. Drennan, quite frankly, is on potentially the hook for murder should [Rodriguez] succumb to the injuries that were inflicted on the night in question."

2. *Analysis*

Alvarez contends that the trial court erred when it ruled that Drennan could assert his Fifth Amendment privilege. Alvarez further argues that the trial court, by so ruling, violated Alvarez's federal and state constitutional rights to compulsory process and to present a defense, and that the error requires reversal, either because it was a structural error, or because it was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). We conclude that, even if the trial court erred in ruling that Drennan could assert the Fifth Amendment privilege (a question we do not decide), the ruling did not violate Alvarez's constitutional rights, and was harmless under the *Watson* standard applicable to nonconstitutional errors (*People v. Watson* (1956) 46 Cal.2d 818, 836).

In *People v. Seijas* (2005) 36 Cal.4th 291 (*Seijas*), our Supreme Court summarized the standards governing a witness's invocation of the Fifth Amendment. "It is a bedrock principle of American (and California) law, embedded in various state and federal constitutional and statutory provisions, that witnesses may not be compelled to incriminate themselves. . . . [T]his privilege 'must be accorded liberal construction in favor of the right it was intended to secure.' [Citation.] A witness may assert the privilege who has 'reasonable cause to apprehend danger from a direct answer.'

[Citations.] However, 'The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination.' [Citation.] The court may require the witness 'to answer if "it clearly appears to the court that he is mistaken." ' [Citation.] 'To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' [Citation.] To deny an assertion of the privilege, 'the judge must be " '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." ' [Citations.] [¶] California's Evidence Code states the test broadly in favor of the privilege: 'Whenever the proffered evidence is claimed to be privileged under Section 940 [the privilege against self-incrimination], the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it *clearly appears* to the court that the proffered evidence *cannot possibly have a tendency* to incriminate the person claiming the privilege.' (Evid.Code, § 404, italics added.)" (*Seijas,* at pp. 304–305.)

At the time of Alvarez's trial, Drennan had entered a guilty plea to robbery in connection with the events of June 12, 2008; his time to appeal had expired; and he was serving his prison sentence. Courts have held that, "[w]hen a defendant has already pled guilty to a charge, and time to appeal the conviction has run without an appeal being filed, the defendant's privilege to avoid compelled self-incrimination with regard to the facts underlying the conviction no longer exists. [Citations.]" (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554; accord, *People v. Sisneros* (2009) 174 Cal.App.4th 142, 151; see *Mitchell v. United States* (1999) 526 U.S. 314, 326 ["where there can be no further incrimination, there is no basis for the assertion of the privilege"].) Here, however, Drennan's counsel argued, and the trial court held, that Drennan could assert the Fifth Amendment privilege because, if Rodriguez were to die from his injuries, Drennan could face prosecution for homicide.

Under the double jeopardy provisions of the United States and California Constitutions, a defendant's conviction or guilty plea bars a subsequent prosecution for the "same offense" (*People v. Scott* (1997) 15 Cal.4th 1188, 1201 (*Scott*)), which generally precludes trying the defendant for a greater offense after he has been convicted of a lesser included offense (*In re Saul S.* (1985) 167 Cal.App.3d 1061, 1065 (*Saul S.*)). However, an exception to traditional double jeopardy analysis applies when the prosecution was unable to proceed on the more serious charge in the initial prosecution because a fact necessary to sustain that charge (such as the victim's death) had not yet occurred. (*Scott*, at p. 1201.) Accordingly, when a defendant is convicted of an injury-causing crime, and the victim subsequently dies from the injuries, double jeopardy principles do not preclude prosecuting the defendant for homicide. (See *Diaz v. United States* (1912) 223 U.S. 442, 448–449; *Scott*, at pp. 1201–1203; *People v. Wilson* (1924) 193 Cal. 512, 515; *People v. Bivens* (1991) 231 Cal.App.3d 653, 661–663; *People v. Breland* (1966) 243 Cal.App.2d 644, 650–652; *Saul S.*, at p. 1068.)

The parties dispute whether this exception to double jeopardy principles warrants a witness's invocation of the Fifth Amendment privilege based on the possibility that a victim may die in the future from his or her injuries. The People argue that, "under the unique circumstances of this case," and in light of the seriousness of Rodriguez's injuries, Drennan could face a future prosecution for homicide, so the trial court was correct in ruling he could assert the Fifth Amendment privilege. Alvarez contends that the above double jeopardy cases are "inapposite," and that the Fifth Amendment privilege did not apply, because (1) Drennan could not incriminate himself for a homicide that had not yet occurred, (2) Drennan's guilty plea to robbery already subjected him to prosecution for felony murder, and any testimony he provided could not further incriminate him, and (3) Drennan's guilty plea would preclude a future prosecution.

We need not determine whether the trial court erred by ruling that Drennan could assert the Fifth Amendment privilege, because we conclude that any such error was harmless. Alvarez contends that the court's ruling "violated [Alvarez's] constitutional right to compel the attendance of witnesses and to enjoy a meaningful opportunity to

present a full defense[.]" (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *In re Martin* (1987) 44 Cal.3d 1, 29–30.) He argues that therefore the error either is reversible per se or is reversible unless harmless beyond a reasonable doubt, the standard set forth in *Chapman, supra,* 386 U.S. 18. We disagree.

Where a trial court's erroneous ruling is not a refusal to permit a defendant to present a defense, but only rejects certain evidence relating to the defense, the error is nonconstitutional and is analyzed for prejudice under *Watson, supra,* 46 Cal.2d 818, i.e., reversal is appropriate only if it is reasonably probable that the defendant would have obtained a more favorable result absent the error. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103; *People v. Garcia* (2008) 160 Cal.App.4th 124, 126, 133 (*Garcia*) [trial court's erroneous refusal to order removal from prison of several inmates who would have testified for defendant was nonconstitutional error].) For example, in *People v. Cudjo* (1993) 6 Cal.4th 585 (*Cudjo*), the trial court erroneously excluded the testimony of a proffered defense witness (who testified, in a hearing out of the jury's presence, that the defendant's brother had confessed to the crime) on the basis that the testimony was not credible. (*Id.* at pp. 604–606, 610.) The Supreme Court held that this error was not a constitutional one, and therefore the *Watson* standard for prejudice applied. (*Cudjo*, at pp. 610–612.) Under that standard, the error was harmless in light of the strong evidence of the defendant's guilt. (*Id.* at pp. 612–614.)[6]

Here, the trial court did not preclude Alvarez from presenting his defense.[7] By ruling that Drennan could assert his Fifth Amendment privilege, the court, at most,

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[6] We note that the United States Court of Appeals for the Ninth Circuit recently disagreed with the conclusion our Supreme Court reached on this point in *Cudjo*. (See *Cudjo v. Ayers* (9th Cir. 2012) 698 F.3d 752, 763, 766.) The Ninth Circuit held that the trial court's ruling in *Cudjo* was a constitutional error, and was not harmless under the standard applicable to such errors on federal habeas review. (*Id*. at pp. 763, 766, 768–770.)

[7] Nor did the prosecutor interfere with Alvarez's right to present witnesses by conduct that "was entirely unnecessary to the proper performance of the prosecutor's

precluded the presentation of some evidence concerning the defense.[8] Alvarez was able to present his defense without Drennan's testimony. As Alvarez notes in his opening brief on appeal, the "heart" of his defense was that he accidentally shot Rodriguez.[9] Alvarez testified to this himself—he stated that "[i]t was an accident the gun even went off[,]" a point he repeated several times during his testimony. In addition, Rodriguez, under questioning by both the prosecution and the defense, provided testimony that Alvarez claims supports his defense of accident—specifically, Rodriguez testified that, after the shooting, Drennan stated repeatedly, " 'This isn't the way this is supposed to happen.' " The jury also heard evidence about the circumstances of the offense that Alvarez argues are more consistent with his theory of accident than with a conclusion that he intentionally fired the shot. For example, Alvarez contends that he would not have been likely to intentionally discharge a firearm when the car was parked so close to other (possibly occupied) vehicles, that the brief scuffle between Rodriguez and his assailants was "conducive to an accidental discharge of the firearm," and that, because Drennan and John-John were just outside the open car door, "in the line of fire," it is "logical to assume" Alvarez would not intentionally fire the gun and risk hitting them. Defense counsel also made some of these points in closing argument. Because this evidence was presented to the jury, the court's privilege ruling did not deprive Alvarez of the right to present his defense. Accordingly, the *Watson* standard of prejudice applies.

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duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify." (*People v. Mincey* (1992) 2 Cal.4th 408, 460 [no violation of defendant's compulsory process or due process rights when witness asserted privilege against self-incrimination "on the advice of her attorney, not because the prosecutor had told her to do so"].)

[8] In contrast to *Cudjo*, the trial court here did not even preclude a defense witness from testifying. (See *Cudjo, supra*, 6 Cal.4th at pp. 604–606.) The court just ruled on a claim of privilege asserted by the witness.

[9] Alvarez also presented a duress defense, testifying that he participated in the robbery because he was afraid of Drennan. On appeal, however, Alvarez focuses solely on his accident defense and makes no argument as to how the trial court's privilege ruling precluded him from presenting the duress defense.

Under the *Watson* standard, the trial court's privilege ruling, even if erroneous, was harmless. As an initial matter, even if the trial court had rejected Drennan's privilege claim and ordered him to testify, it is not clear whether he would have done so.[10] The court's power to hold Drennan in contempt would have provided little coercive effect, given that Drennan was already incarcerated for a substantial period. Further, if Drennan had testified, it is not clear that he would have provided helpful testimony as Alvarez hoped. As Alvarez notes, "it is impossible to determine with any degree of certitude what [Drennan's] testimony would have been."

In any event, even if Drennan had testified that he believed the shooting was accidental, it is not reasonably probable that Alvarez would have obtained a more favorable result, because Alvarez's accident defense was fully explored before the jury. (See *Garcia*, *supra*, 160 Cal.App.4th at p. 134 [error resulting in exclusion of testimony harmless where defense fully explored before the jury].) As noted above, the evidence included Alvarez's testimony that the gun accidentally went off, Drennan's statement that " '[t]his isn't the way this is supposed to happen[,]' " and the circumstantial evidence that Alvarez contends supports the accidental discharge theory. The jury nevertheless rejected Alvarez's position and concluded that he intentionally discharged the gun. It is not reasonably probable that the jury would have reached a different conclusion if it had heard Drennan testify that he believed the shooting was an accident. Whether Alvarez intentionally pulled the trigger or not was a matter uniquely within Alvarez's knowledge, and Drennan could not have testified to Alvarez's mental state at the moment of the shooting. Moreover, to the extent Drennan might have testified that he and Alvarez did not plan in advance to shoot Rodriguez, such testimony may well have been relevant to the charge of attempted murder (on which there was no verdict), but would not be

[10] Prior to the Evidence Code section 402 hearing, Drennan's counsel told the court that, if the court overruled the privilege claim, counsel believed Drennan would testify. During the hearing, Drennan stated that he would assert the privilege in response to any question Alvarez's counsel asked.

inconsistent with the conclusion that, during the scuffle with Rodriguez, Alvarez intentionally fired the gun.

Alvarez contends that the jury's conclusion that he intentionally discharged the gun is inconsistent with its failure to reach a verdict on the attempted murder charge; he argues that this inconsistency shows the case was close and the trial court's ruling was prejudicial. (See, e.g., *People v. Brown* (1993) 17 Cal.App.4th 1389, 1394, 1398; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [where verdict reflected jury's "selective belief in the evidence," erroneous admission of other crimes evidence was prejudicial].) We disagree. The jurors' conclusion that Alvarez intentionally fired the gun during the struggle with Rodriguez is not inconsistent with its inability to reach a verdict on the question of whether Alvarez intended to kill Rodriguez. Indeed, in closing argument, defense counsel argued forcefully that, if Alvarez had intended to kill Rodriguez, he would not have stopped after shooting him once. Noting Rodriguez's testimony that he had seen multiple bullets in the gun's chamber, defense counsel stated: "So if your intention, as [the prosecutor] is asserting in this case, is that you're going to kill someone, you're going to empty that pistol in them, you know." Defense counsel later reiterated this point, noting that Alvarez did not shoot Rodriguez again after he had gotten out of the car and was lying on the ground. "If you want to kill this guy, you shoot him once, he's out on the ground, you just walk over to him and empty that gun in him, and you're assured that he's gone." The jury's inability to reach a verdict as to whether Alvarez intended to kill Rodriguez does not show a reasonable probability that, in the absence of the trial court's alleged error, Alvarez would have obtained a more favorable result on the different question of whether Alvarez intended to discharge the gun.

B. *Ineffective Assistance of Counsel*

Alvarez contends his trial counsel provided ineffective assistance by (1) introducing expert psychological testimony about Alvarez's nonviolent character, thereby allowing the prosecutor to refer to Alvarez's prior misconduct during cross-examination of the expert, and (2) failing to introduce certain exculpatory evidence. On the record before us on direct appeal, we find no basis for reversal of the judgment.

1. *Legal Standards*

"To prevail on a claim of ineffective assistance of counsel, a defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations.]' [Citations.]" (*People v. Hart* (1999) 20 Cal.4th 546, 623–624; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 (*Mendoza Tello*) [" ' "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected' "]; *People v. Fosselman* (1983) 33 Cal.3d 572, 581 (*Fosselman*) [on direct appeal, reviewing court will reverse conviction on the ground of ineffective assistance of counsel "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].)

2. *Introduction of Expert Testimony*

a. *Background*

Prior to trial, Alvarez moved in limine to introduce expert psychological testimony about Alvarez's character trait for nonviolence. The prosecutor moved to exclude the testimony, arguing that the expert should not be permitted to testify as to whether Alvarez possessed the mental state required for conviction. The trial court ruled the testimony was admissible as character evidence.

After the close of the prosecution's case, the prosecutor stated that defense counsel had incorrectly stated in his opening statement that Alvarez had not been involved in the legal system prior to the current incident. The prosecutor had since reviewed Alvarez's juvenile court file, which reflected that Alvarez had 32 disciplinary referrals, for matters including disruptive behavior and fighting, including a gang-related fight. Alvarez was also suspended for shooting a classmate with a weapon made out of pencils and a large rubber band, and on another occasion for threatening other students by brandishing a paring knife over his head. Alvarez apparently had no sustained juvenile petitions. The prosecutor asked the court to authorize her to use the information when she cross-examined Alvarez and his expert witness, Dr. Howard Friedman, because it was relevant to whether Alvarez had a nonviolent character.

Defense counsel objected, arguing that the information in the juvenile court file was unreliable hearsay, and was unsupported by any sustained petitions, documentation or other evidence. He also argued that any evidence of gang involvement was more prejudicial than probative.

The trial court ruled that the prosecutor could use the information in Alvarez's juvenile court file for impeachment purposes during the cross-examination of Dr. Friedman. The court stated that, since Alvarez was presenting evidence of his nonviolent character through Dr. Friedman, cross-examination about his alleged violent conduct was "fair game." The court noted that a defendant's introduction of character evidence can be "dangerous," because it can result in jurors hearing more about the defendant's background than they otherwise would. As to Alvarez's hearsay objection, the court noted that the information was not being admitted for its truth, but to challenge the character witness's opinion about Alvarez's nonviolent character. The court concluded that, because the prosecutor's questions would be based on information in the juvenile court file, they would be asked in good faith.

On direct examination, Dr. Friedman, a clinical neuropsychologist, opined that, based on his evaluation, Alvarez was not a sociopath, did not have an aggressive or violent personality, and did not have antisocial attitudes. Dr. Friedman testified that

alcohol would cause a person with Alvarez's personality characteristics to have less control over his behavior; in a violent situation or if others pushed him toward violence, he would have difficulty managing and restricting his behavior. Dr. Friedman testified that his testing indicated that Alvarez had some problems with acting out, but not at a level that would suggest he would be violent. Alvarez told Dr. Friedman that he had been involved in fights at school. After evaluating Alvarez but before testifying, Dr. Friedman reviewed materials from Alvarez's juvenile file. Nothing in those materials changed Dr. Friedman's conclusions about Alvarez.

During the prosecutor's brief cross-examination, Dr. Friedman testified that he had read Alvarez's juvenile file earlier that day. He had not read the police reports until after he prepared his report. Dr. Friedman testified that, although Alvarez told Dr. Friedman that his legal problems did not begin until he was 18, Alvarez still was a good source of information because he told Dr. Friedman about most of the information in his juvenile file (without specifying his age when the events occurred). Alvarez told Dr. Friedman he had possessed a knife at school, but did not tell him about a separate incident in which he threatened other students with a knife. Dr. Friedman conceded that there were some indicators of violence in Alvarez's life, because he had been in numerous fights while growing up. Dr. Friedman also agreed that it is violent to rob another person, point a gun at his head and neck, shoot him in the back, and push him out of a car and leave him for dead.

On redirect, Dr. Friedman testified that people generally act in conformity with their character and personality, but that it is not possible to predict how an individual will act at a particular time. Part of a psychologist's job is to look for reasons when a person acts outside of his or her character and personality.

b. *Analysis*

Evidence Code section 1101 generally precludes the introduction of character evidence to prove a person's conduct on a particular occasion. (Evid. Code, § 1101, subd. (a).) Under Evidence Code section 1102, a criminal defendant may offer evidence of his character or a trait of his character "to prove his conduct in conformity with such

character or trait of character" (Evid. Code, § 1102, subd. (a)), and the prosecution may offer character evidence in rebuttal (Evid. Code, § 1102, subd. (b)). If a defense witness gives character testimony about the defendant, the prosecutor may cross-examine the witness by asking if he or she has heard of acts or conduct by the defendant that are inconsistent with the witness's testimony. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173.)

Alvarez contends that, because the trial court ruled the prosecutor could impeach Dr. Friedman by asking him about Alvarez's prior alleged conduct, defense counsel performed deficiently by nevertheless deciding to introduce Dr. Friedman's character testimony. We reject this argument, because the record does not disclose that trial counsel's decision lacked a tactical basis, and the decision is not of the type for which there could be no satisfactory explanation. (See *Hart, supra,* 20 Cal.4th at pp. 623–624, 625, 629, 633; *Mendoza Tello, supra,* 15 Cal.4th at p. 266; *Fosselman, supra,* 33 Cal.3d at p. 581.) Based on the present record, defense counsel reasonably could have concluded that, despite the risk of impeachment, Dr. Friedman's testimony would bolster Alvarez's accident and duress defenses.

Dr. Friedman's testimony that Alvarez was not a sociopath or a violent person supported the defense theory that Alvarez shot Rodriguez accidentally, rather than intentionally. Although the prosecutor sought to impeach this testimony by asking Dr. Friedman about Alvarez's fights at school, his possession of a knife at school, and his threatening other students with a knife, that conduct was less serious than the crimes charged in the present case. Accordingly, a tactical decision to present evidence suggesting that an intentional shooting was inconsistent with Alvarez's character (despite the risk of impeachment with incidents of lesser misconduct) would be consistent with defense counsel's effort to persuade the jury that the shooting was accidental.[11]

[11] We note that defense counsel's effort to raise a reasonable doubt as to Alvarez's mental state appears to have been partially successful. Although the jurors agreed that Alvarez intended to fire the gun, they deadlocked on the attempted murder charge, suggesting that they could not agree as to whether Alvarez intended to kill Rodriguez.

Dr. Friedman also testified that alcohol could cause a person with Alvarez's personality characteristics to have less control over his behavior, and, if the situation involved violence or if others were pushing him toward violence, he would have difficulty managing and restricting his behavior. Defense counsel could have reasonably concluded that this testimony would bolster the defense theory that Alvarez was afraid of Drennan and John-John and acted under duress when he participated in the crimes against Rodriguez. Accordingly, on the basis of the facts disclosed by the record, defense counsel could have had a reasonable tactical basis for his decision to present Dr. Friedman's testimony.[12]

Alvarez cites cases in which courts found defense counsel performed deficiently by failing to object to damaging evidence that otherwise would have been inadmissible. (See, e.g., *In re Wilson* (1992) 3 Cal.4th 945, 955–956 [in habeas corpus proceeding, trial counsel's declaration established he had no tactical reason for failure to object]; *People v. Ledesma* (1987) 43 Cal.3d 171, 226–227; *People v. Robertson* (1982) 33 Cal.3d 21, 41–42; *People v. Nation* (1980) 26 Cal.3d 169, 178–179.) These cases are inapposite. Defense counsel did object to the prosecution's planned use of Alvarez's juvenile record to cross-examine Dr. Friedman, but that examination was permissible in light of defense counsel's tactical decision to introduce Dr. Friedman's testimony. (See *People v. Ramos*, *supra,* 15 Cal.4th at p. 1173.)

Alvarez also cites cases from other jurisdictions in which courts found defense counsel performed deficiently by introducing or eliciting harmful evidence. (See, e.g., *United States v. Villalpando* (8th Cir. 2001) 259 F.3d 934, 939 [defense counsel elicited harmful testimony during cross-examination of witness]; *Glancy v. State* (Fla.App. 2006) 941 So.2d 1201, 1203 [same]; *Emilio v. State* (Ga.App. 2003) 588 S.E.2d 797, 798

[12] As Alvarez notes, a decision by defense counsel to *forego* the presentation of character evidence does not necessarily constitute ineffective assistance. (See, e.g., *People v. Pangelina* (1984) 153 Cal.App.3d 1, 8.) But this does not establish that a defense attorney who makes the opposite tactical decision has provided ineffective assistance.

[defense counsel introduced harmful evidence].) Here, defense counsel did not introduce harmful evidence; instead, he introduced what he apparently hoped would still be helpful character evidence, despite being subject to impeachment on cross-examination. As discussed above, the record does not disclose the ultimate reasons for counsel's tactical choice, and it is not of the type that could have no reasonable basis.

Because the appellate record does not establish that trial counsel's performance was deficient, we need not address the parties' arguments as to whether the alleged deficiency prejudiced Alvarez.

3. *Failure to Present Exculpatory Evidence*

a. *Background*

In his declaration supporting his request for removal of Drennan from prison to testify, Alvarez's trial counsel stated that Drennan made statements to the police that were exculpatory as to Alvarez, specifically "that the shooting was accidental." Alvarez's counsel also stated that Drennan "made statements to third party witnesses that it was his idea to rob the victim." After Drennan asserted the Fifth Amendment privilege, Alvarez's trial counsel did not seek to introduce the above statements through the testimony of the persons to whom Drennan allegedly spoke.

b. *Analysis*

Alvarez contends that his trial counsel provided ineffective assistance because he failed to introduce evidence of Drennan's alleged out-of-court statements. This contention is unavailing, because the record on appeal does not reveal the basis for trial counsel's decision not to seek to introduce this evidence, and that decision is not of the type for which there could be no satisfactory explanation. (See *Hart, supra,* 20 Cal.4th at pp. 623–624, 625, 629, 633; *Mendoza Tello, supra,* 15 Cal.4th at p. 266; *Fosselman, supra,* 33 Cal.3d at p. 581.) The record on appeal does not reveal the identities of the third party witnesses, much less the full content of their potential testimony. If Drennan told the witnesses about his and Alvarez's involvement in the crimes, such statements may well have been inculpatory as to Alvarez, in addition to the potentially helpful statements described in trial counsel's declaration. We do not know if Drennan's

statements were consistent or inconsistent with Alvarez's duress defense. Moreover, trial counsel may not have been able to ascertain exactly what the witnesses would say if called to testify. Based on the present record, defense counsel reasonably could have concluded that the witnesses in question would provide testimony more harmful to Alvarez than helpful.

Because the record on appeal does not establish counsel's deficient performance, we do not address the parties' arguments as to whether Drennan's alleged out-of-court statements would have been admissible, or whether counsel's allegedly deficient performance was prejudicial.

C. *The Firearm Use Instruction*

1. *Background*

In connection with counts 1 and 2, the amended information alleged as enhancements that Alvarez: (1) personally used a firearm (§ 12022.53, subd. (b)); (2) personally and intentionally discharged a firearm (§ 12022.53, subd. (c)); and (3) personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The prosecutor submitted a proposed instruction based on CALCRIM No. 3149, the instruction for the section 12022.53, subdivision (d) enhancement. Neither party requested instructions on the enhancements in section 12022.53, subdivisions (b) and (c).

In connection with his defense that the shooting was accidental (and therefore he was not guilty of attempted murder or intentional discharge of a firearm), Alvarez submitted a proposed instruction based on CALCRIM No. 3404. While discussing this proposed instruction, the trial court and the parties agreed that it should refer to the enhancement in section 12022.53, subdivision (d) (intentional discharge with great bodily injury), but not the enhancement in section 12022.53, subdivision (c) (intentional discharge), because there was no basis for a jury finding that Alvarez intentionally discharged the gun but did not cause great bodily injury to the victim. The court and the parties had the following exchange:

"THE COURT: . . . So if it reads—you're in agreement then if it reads, 'The defendant is not guilty of attempted murder or the allegation of personal and intentional discharge of a firearm, a handgun, which proximately caused great bodily injury to O.R. within the meaning of Penal Code section 12022.53?' Would we have (d) or (c), because I don't—I think the evidence here is either there's the discharge of a firearm with great bodily injury or nothing, because I don't think there's any testimony that—that the complaining witness didn't suffer anything but great bodily injury.

"[DEFENSE COUNSEL]: Right. Right. No, but it's just—I just did it according to the Information.

"[PROSECUTOR]: Right.

"THE COURT: I know. This is not a criticism. This is—

"[PROSECUTOR]: No. I agree. I mean, I don't think they're going to find that he shot the gun but didn't cause great bodily injury.

"THE COURT: Right. So we should just tell them 12022.53 subdivision (d), correct?

"[PROSECUTOR]: Right.

"THE COURT: Do you agree, [defense counsel]?

"[DEFENSE COUNSEL]: Yes, I agree."

After the court read the proposed accident instruction with the reference only to section 12022.53, subdivision (d), defense counsel confirmed that he agreed with the instruction.

Later in the jury instruction conference, the court and the parties discussed the instructions on the elements of the charged crimes and enhancements, and noted that neither the instructions nor the verdict form should refer to the enhancement in section 12022.53, subdivision (c). They decided not to use CALCRIM No. 3150, which is appropriate when the enhancements in section 12022.53, subdivisions (c) and (d) are both charged. (See CALCRIM No. 3150, Bench Notes.) The parties did not discuss the enhancement in section 12022.53, subdivision (b) (personal use of a firearm), or CALCRIM No. 3146, the instruction covering that enhancement. At the conclusion of

the conference, the parties confirmed they had no objections or additions to the court's instructions.

The court subsequently instructed the jury on the section 12022.53, subdivision (d) enhancement, using a modified version of CALCRIM No. 3149. The court also instructed the jury on the defense of accident, using a modified version of CALCRIM No. 3404 that referred only to the section 12022.53, subdivision (d) enhancement. The court did not instruct the jury on the enhancements in section 12022.53, subdivisions (b) and (c).

The verdict form, which both parties approved, asked the jury to determine the applicability of the section 12022.53, subdivision (d) enhancement. The verdict form did not refer to the enhancements in section 12022.53, subdivisions (b) and (c), and did not ask the jury to determine whether those enhancements applied.

2. *Analysis*

Alvarez contends that the trial court had a sua sponte duty to instruct the jury on the section 12022.53, subdivision (b) enhancement, either because that enhancement was charged in the information, or because "it is a lesser included to" the section 12022.53, subdivision (d) enhancement. We disagree.

The People initially suggest that Alvarez, by failing to object to the prosecutor's request to instruct on the section 12022.53, subdivision (d) enhancement (CALCRIM No. 3149), and by agreeing that the accident instruction (CALCRIM No. 3404) should refer only to that enhancement, forfeited his claim of instructional error under the doctrine of invited error. We reject this argument. "Invited error . . . will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) Here, the record does not reflect that the trial court or the parties considered or discussed whether to instruct on the section 12022.53, subdivision (b) enhancement (although they expressly decided not to instruct on the section 12022.53, subdivision (c) enhancement), much less that defense counsel expressed a deliberate tactical purpose for withholding such an instruction. (See *People v. Valdez*, at pp. 115–116 [invited error doctrine did not apply

where record was ambiguous as to whether defense counsel considered and rejected instructions on all potential lesser included offenses]; *People v. Moon* (2005) 37 Cal.4th 1, 28 [record showed no tactical reason for defense counsel's acquiescence in instruction].) The invited error doctrine does not apply.

Turning to the merits, Alvarez contends that, even if the section 12022.53, subdivision (b) enhancement had not been charged in the information, the trial court had a sua sponte duty to instruct on it as a "lesser included to" the section 12022.53, subdivision (d) enhancement. "[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 645; accord, *People v. Cook* (2001) 91 Cal.App.4th 910, 917.) In *People v. Majors* (1998) 18 Cal.4th 385, 410 (*Majors*), the California Supreme Court expressly held that a trial court has no duty to instruct sua sponte on "so-called 'lesser included enhancements.' " The court explained: "One of the primary reasons for requiring instructions on lesser included offenses is ' "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between [guilt] and innocence" '—that is, to eliminate ' "the risk that the jury will convict . . . simply to avoid setting the defendant free." ' [Citation.] This risk is wholly absent with respect to enhancements, which a jury does not even consider unless it has already convicted defendant of the underlying substantive offenses." (*Id.* at pp. 410–411.) This court is bound by the holding in *Majors*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Alvarez argues that the holding in *Majors* has been undercut by subsequent authority, including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*). Alvarez asserts that these cases have "eviscerated *Major*'s distinction between a sentence enhancement and a substantive offense because the essential principle underlying the *Apprendi* line of cases is that there can be no constitutionally meaningful difference between the two." We disagree. In *Apprendi*, the United States Supreme

Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, at p. 490; accord, *Blakely*, at pp. 301, 303–305 [under *Apprendi*, facts that authorize sentence longer than that authorized by jury verdict must be found by jury rather than judge].) In *Seel*, our Supreme Court held that, in light of *Apprendi*, double jeopardy protections precluded retrial of premeditation allegations after a finding of evidentiary insufficiency. (*Seel*, at p. 539.)

The cited cases do not undercut the holding in *Majors* that the trial court has no obligation to instruct sua sponte on lesser included enhancements. As to *Apprendi* and *Blakely*, the holding in *Majors* does not remove from the jury the ability to act as the factfinder to increase the penalty for a crime beyond the maximum sentence that would be available for a conviction of the underlying offense alone. Here, for example, the jury, not the trial court, determined the section 12022.53, subdivision (d) enhancement applied. Similarly, the *Seel* court's double jeopardy holding can be applied consistently with *Majors*, in the event an enhancement is reversed following a finding of insufficient evidence. We thus follow *Majors*, and we decline to impose an obligation to instruct sua sponte on lesser included enhancements.

In addition to his argument about lesser included enhancements, Alvarez contends that the trial court was obligated to instruct on the section 12022.53, subdivision (b) enhancement because it was alleged in the information. The trial court must instruct sua sponte on "the general principles of law relevant to and governing the case," including the elements of charged offenses. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*).) In *People v. Wims* (1995) 10 Cal.4th 293 (*Wims*), overruled on other grounds in *Sengpadychith*, at pages 325–326, our Supreme Court applied that obligation to enhancements, holding that "a defendant is entitled to proper jury instructions regarding the meaning of a weapon use enhancement allegation which is tried to a jury." (*Wims*, at p. 303; accord, *People v. Najera* (1972) 8 Cal.3d 504, 510 (*Najera*), approved in part and disapproved in part in

People v. Wiley (1995) 9 Cal.4th 580, 588.) When a trial court submits an enhancement allegation to the jury for decision, the court's failure to instruct on an element of the enhancement is error—the failure is federal constitutional error if submission of the enhancement to the jury is constitutionally required under *Apprendi*; it is state law error if submission is not required under *Apprendi* but is required under state law. (See *Sengpadychith,* at pp. 321, 324–326 [trial court submitted criminal street gang sentence enhancement to jury, but failed to explain all elements of enhancement].)

The above cases are distinguishable. Here, the trial court *did* instruct on the elements of the only firearm use enhancement that was submitted to the jury for decision (the § 12022.53, subd. (d) enhancement), and Alvarez does not claim that instruction was inaccurate. Neither the court's instructions nor the verdict form asked the jury to determine the applicability of the section 12022.53, subdivision (b) enhancement, and the jury rendered no verdict on that enhancement. Accordingly, this is not a case in which the jury found a sentence enhancement applicable without adequate instructions as to its elements; instead, the enhancement at issue just was not submitted to the jury at all.

Even assuming the trial court erred by failing to ensure (in the absence of a request from either party) that the section 12022.53, subdivision (b) enhancement was submitted to the jury,[13] Alvarez has shown no prejudice from that error.[14] The jury, after being properly instructed on the section 12022.53, subdivision (d) enhancement, found that

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[13] The People, citing section 1385, suggest that the trial court effectively dismissed the section 12022.53, subdivision (b) enhancement. But the minutes do not reflect the reasons for such a dismissal (see § 1385, subd. (a)), nor does the reporter's transcript show that the parties and the court discussed the section 12022.53, subdivision (b) enhancement or agreed not to submit it to the jury. Instead, they just agreed not to submit the section 12022.53, subdivision (c) enhancement.

[14] In his opening brief on appeal, Alvarez acknowledges that "[o]rdinarily, a defendant would be quite happy if a trial court neglected to instruct the jury on a charged offense or enhancement. Because it eliminated exposure to additional punishment, defendant would have no cause to complain of the omission on appeal." (See *Najera, supra,* 8 Cal.3d at pp. 508–512 [by failing to submit enhancement to jury, People waived application of enhancement]; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281–1283 [same].)

Alvarez personally and intentionally discharged a firearm causing great bodily injury. If the jury had also considered and found true the lesser allegation that Alvarez personally used a firearm under section 12022.53, subdivision (b), the statute would have required the trial court to impose "the enhancement that provides the longest term of imprisonment[,]" i.e., the 25-years-to-life term specified in section 12022.53, subdivision (d). (See § 12022.53, subd. (f).) Alvarez's sentence would have been identical to the one he actually received.

Alvarez argues that, because the greater enhancement (§ 12022.53, subd. (d)) was submitted to the jury, the failure to submit the lesser enhancement (§ 12022.53, subd. (b)) operated to his detriment. Alvarez argues that this omission left the jury with an "all-or-nothing choice" between finding applicable the more serious firearm use enhancement, or no firearm use enhancement at all. Alvarez has not shown cognizable prejudice. As discussed above, our Supreme Court has expressly held that the concern about presenting the jury with an "all-or-nothing" choice between conviction of a greater offense and acquittal (which is a primary rationale for requiring instructions on lesser included *offenses*) does not apply in the context of enhancements. (*Majors*, *supra*, 18 Cal.4th at p. 410.)

III. DISPOSITION

The judgment is affirmed.

_____
Bruiniers, J.

We concur:

_____
Simons, Acting P. J.

_____
Needham, J.